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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

TWIN FALLS-SALMON RIVER LAND & WATER COMPANY, a Corporation, SALMON RIVER CANAL COMPANY, LIMITED, a Corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

SUPPLEMENTAL BRIEF OF APPELLANT

Twin Falls-Salmon River Land and Water Company

SAMUEL H. HAYS,
Solicitor for Appellant,
Twin Falls-Salman River Land and Water Company.

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STATEMENT.

Since this case was argued two additional briefs have been filed amici curiae and a number of cases have arisen in the State courts which involve questions here at issue.

Since this is the first case of this kind brought to this Court, and as the decision will probably go to the very foundation of the contracts made under the Carey Act method of reclamation, it is extremely important that the

case be fully presented. In the original brief some of the points at issue were but lightly touched upon, and the case was presented merely from the standpoint of securing a reversal of the decision of the lower court. Considering the nature of the case, a broader discussion of the problem is necessary and desirable. Therefore, in the present brief, we will present an outline of the whole Carey Act plan and discuss the case from that standpoint.

The Act of Congress of August 18, 1894, known as the Carey Act, provided for the granting to each of the States in the arid region of one million acres of desert land, provided the State would secure its reclamation. The Act of June 11, 1896, authorized the State to create a lien, valid against the land, for the actual cost and necessary expenses of reclamation, with reasonable interest thereon.

The State by its statute (Sec. 1615, R. C.) provided that any person desiring to construct irrigation works, under the provisions of the Act of Congress might file a proposal for the construction of the works and a request for the segregation of the lands. Under the statute (Sec. 1618, R. C.) it became the duty of the State Engineer to examine and report upon the feasibility of the project, the sufficiency of the water supply, and other similar matters. Upon a favorable report being given the proposal is presented to the State Board of Land Commissioners for approval, and if approved (Sec. 1619, R. C.) the proposal and request is filed in the local land office and transmitted to the Department of the Interior. Upon approval by the Department (Sec. 1621, R. C.) the State enters into a formal contract for the construction of the works with the

parties submitting the proposal. The contract must contain complete specification of the works to be built, the cost to the settlers, and the terms on which the State will dispose of its lands. The terms of the contract are provided by statute (Sec. 1621-3, R. C.). This contract is commonly called the "State Contract." Subsequently contracts are made with the individual settlers, called "Settlers Contracts," under which the settlers agree to pay the lien upon the lands entered by them.

At the time of filing the proposal a water permit is taken out in the State Engineer's office for the irrigation of the entire body of land. This permit authorizes the diversion from the stream of a certain number of cubic feet of water per second for the irrigation of the entire body of land (Sec. 3253 R. C.). Under the statute (Sec. 1615, R. C.) the right of the settler to the water represented by the permit taken out for the entire tract is a proportionate interest therein.

In this case, a proposal to build works for the irrigation of 150,00 acres of land was filed with the State Board of Land Commissioners. The proposal was, after examination, approved by the State Engineer, who reported that the water supply was sufficient for the irrigation of 150,000 acres of land. The water permits were approved. Thereafter the State Land Board approved the project, the Department of the Interior likewise approved the project, and the State then entered into a formal contract for the construction of the works with the successors in interest of the persons making the original proposal. The works have been completed and in operation

since 1911, more than 30,000 acres being irrigated in the season of 1914 prior to the commencement of this suit.

As previously stated, the project originally covered 150,000 acres. When the works came to be actually built, by an arrangement with the Land Board it was provided that the works should cover only 100,000 acres. Later on, when the lands were thrown open for entry, only 80,000 acres were opened for settlement. Of this amount, 73,748 acres were entered. At the time of the hearing a very considerable acreage had been forfeited, so that the project had been reduced in area to 57,348 acres (Sec. 1628 R. C.).

THE ISSUES.

It is claimed by the complainants that in the making of the contract between the State and the Construction Company (a defendant in the case) that it was agreed on behalf of the company that a water supply of 2.75 acre feet per acre during each irrigation season under a rotation system or a supply of .01 of a second foot of water per acre continuous flow from April 1st to November 1st of each year, amounting to 4.16 acre feet per acre, would be furnished to the settlers.

On the part of the defendant it is claimed that no such promise was made; that under the statute a water permit is first taken out for the entire project in bulk; that this permit represents the supply for the tract, and that under the statute (Sec. 1615, R. C.) the interest of each settler in this water supply and in the works to be built is a "proportionate" interest; that the Company is related to the project simply as a construction company, building the works which the settlers are to thereafter own through the medium of an operating company, and that it did not enter

into any covenant, either temporary or perpetual, whereby it agreed to furnish the water supply claimed during each irrigation season; that the sufficiency of the water supply was first examined by the State Engineer, was approved by him and by the State Land Board, and afterward by the Department of the Interior, and that it is no longer open to question.

In addition to this the complainants aver that the water supply claimed is absolutely necessary for the irrigation of the lands; that the flow of the stream is insufficient to furnish such a supply, and that for this reason the lands will not be patented by the United States to the State, and therefore the settlers will not be able to obtain title to their entries, and for this reason they should not be called upon to make payment until a further water supply is furnished or the area of the project reduced.

The company claims that with reasonable use the existing water supply is sufficient for the present area of the project.

The State Engineer originally reported a water supply of 400,000 acre feet, which was deemed sufficient for the irrigation of 150,000 acres of land. The record of the water supply since taken shows a supply of 130,000 acre feet, available for the 57,348 acres now in the project. A water supply of 400,000 acre feet for 150,000 acres of land would mean 2.66 acre feet per acre, measured at the point of inflow into the reservoir. At that rate, 130,000 acre feet would serve 48,750 acres. Stated in another way, 130,000 acre feet for 57,348 acres would mean 2.26 acre feet for each acre.

Long prior to the construction of these irrigation works

the Salmon River, the stream in question, was estimated to have a flow of 1820 cubic feet per second, an amount of water the sufficiency of which for 150,000 acres would not even now be questioned.

See Vol. 1, Report of the special Committee of the United States Senate on Irrigation and Reclamation of Arid Lands. Report No. 928, May 8, 1890, Page 40.

As the flow of the stream from which the water supply is taken constantly fluctuates from year to year, it is important to the Construction Company to know just how long this question of the sufficiency of the water supply is open for consideration, and what the effect of the variation will be. From the record of the flow of the stream taken since the construction was commenced or completed it appears that there are considerable variations from year to year. Admittedly 1914-15 were very dry. Whether the late years during which measurements have been taken are average years or not, it is difficult to determine. We may illustrate this by the Weather Bureau records at the Boise station. The dryest year on record at Boise was 1868, when the precipitation only amounted to 6.69 inches; the second dryest was 1895, with 7.90 inches; the third was 1914, with 8.60 inches. The wettest year on record was 1875, with 25.80 inches; the second wettest was 1896, with 22.95 inches; the third was 1884, with 21.05 inches. The average is 12.71 inches. The records at Boise cover a period of 46 years.

Under the circumstances the vital questions to be decided are:

1. Was the approval of the project and of the suffic-

iency of the water supply by the State Engineer and the Land Board binding on the State?

2. Was the approval of the Secretary of the Interior binding on the government?

Can the Secretary revoke his approval after the works are built?

Can patent be withheld after the works are built in accordance with the approved plan?

3. After the project has been approved by the State and National authorities and a formal contract entered into for the building of the works, and settlement thereafter made, can the settlers then object to the sufficiency of the water supply?

4. Does the State, in examining and approving the project prior to the settlement of the lands, act as the agent or trustee for the settlers thereafter to occupy the project?

5. Did the company make a contract to provide a water supply of 2.75 acre feet of water per acre during each irrigation season, or a supply of .01 of a second foot per acre continuous flow from April 1st to November 1st of each year, amounting to 4.16 acre feet of water per acre?

Or did it take out a right in bulk for the entire tract, and does the statute provide the interest which the settler has in such supply?

6. Where is the point of measurement of the water supply?

In order to determine these questions it is necessary to consider the plan of reclamation contemplated by the Carey Act and the procedure thereunder, and the character of the grant made by the United States to the State.

The Carey Act Plan.

In construing the act we must take into consideration the conditions existing at the time of its enactment.

Prior to the time of the enactment of the law there was a considerable demand that the general Government grant to each State in the arid region all of the irrigable land within its borders (See Report of the Special Committee, United States Senate, Irrigation and Reclamation of Arid Lands, 1890, Vol. 2, Page 143). It was in response to this demand that the Government made its grant of 1,000,000 acres of land to each of the desert land States.

The Irrigation District Law had shortly before been enacted in California. This law provided for the assessment of the cost of the building of the works against the lands benefited. With this in mind the act provided for the granting of a lien against the land to be reclaimed for the amount of the actual cost and necessary expenses of reclamation, with reasonable interest thereon.

The Carey Act was in substance a desert land law, and provided in terms that under this act the lands should be reclaimed "as thoroughly as is required of citizens who may enter under the said desert land law." The company building the works is related to the undertaking simply as a construction company, and this was explicitly stated in the Rules and Regulations of the Land Board.

Rules and Regulations adopted June 10, 1905, page 6.

Rules and Regulations adopted October 16, 1909, page 6.

State v. Twin Falls Canal Co. 21 Idaho, 410 (see bottom page 424).

Idaho Irrigation Co. v. Lincoln County, 152 Pac. 1058 (1061).

It occupies much the same position as a contractor building works for an irrigation district with the difference that a lien on the land is given direct to the contractor instead of bonds being issued.

The Carey Act and the State legislation supplementary thereto was passed for the purpose of remedying certain difficulties which had arisen in irrigation development, particularly in the State of Colorado.

In that State and some others, under the original plan for the development of irrigation projects, water rights under canals were sold, and in addition to this an annual maintenance charge was made. This "water right" charge was either held invalid by the courts or wiped out by legislative enactments, leaving the ditch companies standing in the position of common carriers.

Mills Irrigation Manual, p. 141.

Finding this an unsatisfactory condition the companies, in many instances, made arrangements to turn over the canals to the settlers when the "estimated capacity" of the canal was sold. Much difficulty arose out of this arrangement. In some cases it was claimed that the canals were insufficient in size or improperly designed. In others it was claimed that the water supply was insufficient. In one case the contract provided that the water right was the right to "1.44 cubic feet of water flowing over a weir, per second." And the contract also provided that the "company agrees that when it shall have sold and have outstanding and in force a number of water

rights equal to the estimated capacity of the company's canal to furnish water" that it would turn over the system.

These two clauses of the contract led the courts to hold that the "estimated capacity should be considered to mean the building of the canal to supply water under ordinary conditions."

Wyatt v. Larimer & Weld Irrigation Co. 33 Pac. 144.

In some cases it was held that the later purchasers acquired no water right.

Blakely v. Ft. Lyon Co. 73 Pac. 249.

See Mead's Irrigation Institutions, pages 93-98.

See also Eaton v. Larimer & Weld Co. 83 Pac. 627.

La Junta Co. v. Hess 42 Pac. 50 and 71 Pac. 415.

Kinney on Irrigation, secs. 1516-19.

These difficulties led up to the idea which then prevailed that a cure might be found for these troubles in State supervision. This view was set forth by the State Engineer of Wyoming in his report for the years 1893-94, page 99. And in his report for the year 1895-96, page 20, in setting forth the advantages of the Carey Act, page 20-1, he enumerates the advantages as follows:

"1. Cheap land. Fifty cents an acre! less than one-half the price paid under the Desert Land law.

"2. A State guaranty that there is water enough in the source of supply and that the canal has sufficient capacity to deliver it."

See Mead's Irrigation Institutions, p. 25.

It was the idea under the Carey Act plan that the State should supervise the proceedings and should determine in advance the works that were to be built, the cost to the settler and the sufficiency of the water supply, and that the Company should stand in relation to the project as a construction company only.

The Idaho statute was copied from Wyoming, and the plan of procedure under it was as follows: Any person desiring to construct irrigation works to reclaim land under the Carey Act was required to file with the State Board of Land Commissioners a proposal to construct the works, which proposal must be accompanied by the certificate of the State Engineer that an application for a permit to appropriate water has been filed in his office together with the State Engineer's report thereon. The proposal must state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights representing a proportionate interest in the irrigation works and water supply would be sold to the settlers. With the proposal also is filed a request for the segregation of the lands to be irrigated (Sec. 1615, R. C.). This proposal may be considered as a bid for the doing of the work and the statute may be considered as an advertisement for bids. Following this theory a check is required to be deposited by the bidder (Sec. 1616, R. C.) in order to guarantee the execution of a contract with the State in case the bid or proposal is finally accepted.

In Idaho public waters are the property of the State.

Sec. 1, Art. 15, State Constitution.

In order to provide a convenient method of attaching a water supply to the project it is provided that the person filing the proposal shall file with the State Engineer an application for a permit to appropriate water for the reclamation of the lands. This application is in a form prescribed by the State Engineer and is accompanied by a map of the land in question and must show the location and dimensions of the works. It also requests leave to divert a certain amount of water in bulk for the irrigation of the entire tract. When the proposal and application for water permit have been presented they are referred to the State Engineer for his action and report thereon (Sec. 1618, R. C.). Under the statute the State Engineer must make a written report to the Land Board stating the following things:

1. Whether or not the proposed works are feasible.

2. Whether the proposed diversion of the public waters of the State will prove beneficial to the public interest.

3. Whether there is sufficient unappropriated water in the source of supply.

4. Whether or not a permit to divert and appropriate water through the proposed works has been approved by him.

5. Whether the capacity of the proposed works is adequate to reclaim the land described.

6. Whether or not the proposed cost of construction is reasonable.

7. Whether or not the maps comply with the requirements of the Department of the Interior.

8. Whether the lands are desert in character. (Sec. 1618 R. C.).

When the report of the State Engineer is received the matter goes before the Land Board for approval (Sec. 1619 R. C.). If the State Engineer's report is adverse the project must be dropped (Sec. 1620, R. C.). If satisfactory, the papers are presented to the local land office, with a request for the withdrawal of the land described in the proposal, and the papers are then forwarded to the Department of the Interior for approval by the Secretary.

The Act of Congress of 1894 provides that the State shall file a map of the said land proposed to be irrigated, which shall exhibit

> "a plan showing the mode of the contemplated irrigation, which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation. And the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the filing of the map and plan of irrigation. But such reservation shall be of no force whatever if such map and plans of irrigation shall not be approved."

While the papers are presented to the local land office for transmission to the Department of the Interior, and in order that the lands proposed to be irrigated may be noted on the land office plat, the plans are presented to the Secretary not for any merely preliminary action, but for approval.

The Company, as heretofore stated, is related to the project simply as a construction company and this is in

harmony with both the National and State laws. The statute setting forth the things to be specified in the contract provides only for construction matters (Sec. 1621-2, R. C.).

See Sauve v. Guaranty & Surety Co. 158 Pac. 112.

The Idaho contracts have frequently contained matter in addition to that prescribed by the statute. This has been done as a matter of convenience, and the additional provisions cover such questions as the location of highways (p. 58, Tr.), water supply for cities and towns (p. 59, Tr.), the method of transferring the system to the settler (p. 52, Tr.), and other similar matters not specifically covered by the statute. The State Land Board, however, is not authorized to insert in the Carey Act contract, matters for which no sanction is found in the statute.

State v. Des Chutes Land Co. 129 Pac. 764.

Every construction contract contemplates that the thing to be done shall be decided in advance. Where irrigation works are to be built it must be determined:

1. What acreage is to be covered.
2. The dimensions and grades of the ditches to be built.
3. The amount and sufficiency of the water supply.
4. The cost of the works.

Now the cost of the works determines the amount of the lien upon the various legal subdivisions of land, and this question of fixing the lien under a statute quite similar came up for determination before the Orgeon State Land Board, in 1902. It was referred to Hon. George H. Williams, and in his letter to the Land Board (see Report of

State Land Board relative to desert lands, for the period ending Sept. 30, 1902, pages 24-5) he said, in relation to determining the cost in advance:

> "I can see no reason for submitting such an estimate (of the cost) to the State Board, unless it is to furnish it with information upon which it could fix the amount of the lien in the contract. I do not wish to be understood as saying that the State Board is bound by this estimate. It may act upon any information derived from any satisfactory source. Estimates of architects and engineers for the construction of buildings, bridges, ships and other structures, are considered a safe basis upon which contractors agree to do the work for a specific sum fixed in the contract. And it would seem that an estimate satisfactory to the State Board might safely be made the basis for fixing the amount of the cost in a contract for the reclamation of arid lands. * * * To facilitate and encourage the reclamation of arid lands is the object both of Congress and the State by the legislation above referred to, and to that end the rights and liabilities of contractors and settlers should be made as certain as the law will allow. Persons would be much more likely to engage in enterprises of this kind if they knew at the start upon what they can depend as to their rights and obligations than they will if all is left to the contingencies and uncertainties of the future. I am of the opinion that the amount of the lien and the cost of maintenance should be fixed in the contract for the reclamation of arid lands, at the time the contract is made."

The decisions of the Supreme Court of the State of Idaho are to the same effect.

Idaho Irr. Co. v. Pew, 26 Ida. 272 (278).

The object of the act of 1896 was to fix the lien prior to patent.

In the debate in congress it was said:

> "It is proposed now by this amendment to authorize those states to provide means by which liens can

be created, upon the land to be irrigated and that those liens shall be enforced up to the time that the land is patented to the settler."

See Proceedings 1st Sess. 54 Congress, p. 6222, Column 2.

In the plan presented by the State statute the bidder, or person proposing to build the works, presents to the State Land Board the plans and specifications of the works he proposes to build, a statement of their cost, and an application or permit for the appropriation of water for the irrigation of the lands. The State Engineer, acting for the State and the settlers, who are thereafter to occupy the tract, examines the plans, investigates the water supply and reports on the feasibility of the project and the sufficiency of the water supply. He is a public officer upon whom the law imposes this duty. If he disapproves, the project must be dropped (Sec. 1619 R. C.). If he approves the plan it then goes to the Land Board, thence to the Department of the Interior, thence back to the Land Board for the execution of a formal contract for the construction of the works.

This is a determination in advance as to what shall be built, the price to be charged the settlers, and the sufficiency of the water supply. This matter is in no respect left to the whim or caprice or judgment of the person proposing to construct the works. The whole matter must be first approved by the State and next by the National government. All these things are done before the execution of the contract between the State and the construction company, which contract fixes the lien upon the land; and it is not until after these things are done that

the land is thrown open for settlement (Sec. 1625, R. C.).

It is a well settled rule of law that where officers, such as the State Engineer and the Secretary of the Interior pass upon matters of this character, that is to say, when jurisdiction is delegated to them, that the disapproval or approval, as in this case, is conclusive.

United States v. California & Oregon Land Co. 148 U. S. 31.

Under the Act of Congress the plan presented to the Secretary of the Interior must be one

> "sufficient to thoroughly irrigate said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation."

The Secretary has the duty imposed on him of acting on the plan and approving or rejecting it. If he approves the plan his action is final.

In the annual report of the Commissioner of the General Land Office for 1911, pages 11 and 12, in speaking of these projects it is said:

> "The importance of this (the examination of projects) cannot be overestimated, for not only will the lands remain segregated for a long period of time if the order therefor is once made, but in making such segregation the Department is practically committed to the feasibility of the proposition submitted by the State, and people thereafter dealing with the State are in a great degree entitled to regard the proposition of the State as having received the endorsement of the Department."

This statement of the Commissioner may be criticised on the ground that it does not go far enough, but never-

theless it shows the recognition of the principle. In the instructions of the Secretary of the Interior, of March 9, 1909, 37 L. D. 489, in speaking of Carey Act projects it is said:

> "In brief, the time to ascertain whether the lands are of a character subject to segregation under the Carey Act and whether there is water available for their reclamation is *prior to segregation.*"

It was also said (page 491):

> "The report must also describe the locations of the reservoirs, canals and ditches proposed to be constructed for reclaiming the lands and state whether the plan of irrigation through and by them is feasible."

From the very beginning the requirements of the Department (Regulations of Nov. 22, 1894, 20 L. D. 440) provided as follows:

> "The State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary. The other data required cannot be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the lands selected must be submitted."

These instructions have been constantly repeated.

> Instructions Sept. 20, 1889, 27 L. D. 635 (637).
> Instructions Jan. 15, 1902, 31 L. D. 228 (230).
> Instructions Apr. 9, 1909, 37 L. D. 624.

The nature of the works to be built must be determined in advance. The cost which fixes the amount of the lien

upon each acre is likewise determined in advance, and the courts have held that this determination is final.

> Idaho Irrigation Company v. Pew, 26 Idaho, 272 (278).

It has sometimes been claimed that the action of the Secretary in approving the plan was not final, and that the lien which the statute provided should be valid "when created," should only be valid on the lands which were *afterwards* "reclaimed," and that patent would not issue until

> "an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim * * * said lands."

In order to determine what is meant by this statute and whether or not the Secretary of the Interior may refuse, after the works have been built for the irrigation of the lands, to issue a patent, on the grounds that he does not think the water supply sufficient, we must take into consideration the legislation existing at the time of the enactment of the Carey Act, and the decisions under it, and how the question was determined as to whether land had been "reclaimed" or not.

As before stated, the Carey Act is a reclamation act. In fact it was expressly provided by the act of 1894 that Carey Act land should be reclaimed

> "as thoroughly as may be required of citizens who may enter under the said Desert Land law."

Under the Desert Land Act (19 Statutes at Large, 377), it was provided that an entry of desert land might be made by paying the fee and filing a declaration under

oath that the entryman intended to reclaim a tract of desert land

> "by conducting water upon the same within a period of three years thereafter."

The act also provided:

> "At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid,"

and upon payment of the fees a patent for the land would be issued to the settler. The Desert Land Law originally did not require settlement or cultivation. It merely required "reclamation," and this was to be accomplished by building such a system of ditches as would carry to the subdivisions of land capable of being reached by the surface flow, a supply of water such as when let out of the ditches might spread over the accessible parts of the land and stimulate vegetable life. If the main ditches were thus constructed, with the required adequate supply of water to irrigate the lands for the purpose of cultivation, the reclamation contemplated by the State was accomplished, without showing actual use of the water in cultivation.

U. S. v. Mackintosh, 85 Fed. 333.

Connor v. U. S. 214 Fed. 522.

It was not necessary that a crop should be raised or that the water should be turned out over the land, when there was no crop to irrigate. The Secretary of the Interior held under this act,

> "it appears by the printed form for taking proof that the rules of the office require that it should ap-

pear not only that the claimant has conducted the water on the land, but that he has raised an agricultural crop. There is nothing in the act that requires such proof to be furnished, and in the case referred to, I said I did not think a regulation of the office that such proof be furnished can be said to be in contravention of the act. I am disposed to modify the views thus expressed, as it may be a hardship in many cases to require proof of this character. The fact to be ascertained is, has the claimant of desert lands reclaimed the lands within the meaning of the act? * * * In all the arid districts where the desert act is in force it has been found that some years an agricultural crop may be raised with but little water, and in some instances with none. Taking a favorable year, the proof of an agricultural crop might enable the claimant to enter, and the following year and many years thereafter he might not be able to raise a crop with the amount of water owned by him in connection with the land he claims to have reclaimed. The act gives him three years to reclaim the land. It must be supposed that he has the full three years in which to construct his ditches and carry the water to his land, and prove up. If it is said that no other proof shall be received save that of a growing crop, he may be compelled to put his water on the land within a less time than provided for in the act, for he must have his water on at least four or five months before he can mature his agricultural crop. The act very clearly contemplates that the reclamation must be from a desert state to an agricultural one, and that is proved where it shows that the claimant is the owner of a sufficient quantity of water to irrigate the land claimed, sufficiently for agricultural purposes and has conveyed such water on the lands in such manner that he can use it for the purpose of irrigating his crop. The mere carrying of water on the land is not sufficient; it must be in sufficient quantities and in such manner that it may be distributed in such quantities that a crop can be raised by the aid of the water so conveyed to the land. I do not think it necessary to distribute the water

over the land as it is done in the course of irrigation. * * * Your regulations should therefore be so amended as to allow other evidences of the reclamation of land besides that of a growing crop. The raising of an agricultural crop may be evidence of reclamation, but it is not the only evidence that ought to be received, and ought not at any time to dispense with actual proof as to the character and the ditch quantity of water, etc., owned by the claimant. I do not wish to be understood as holding that the water must cover all of the land, but it must be carried to a part whence it can be distributed over the land, except where high points and uneven surface make it practicably impossible that it should be done."

Instruction of Secretary Teller, 3 L. D. 385.

See also Case of Bill, 20 L. D. 61.

U. S. v. McKinney, 27 L. D. 516.

In 1891 the Desert Land Act was changed (26th Statutes at Large, 1096) by providing for a certain amount of cultivation to be done and also that a plan showing the mode of the contemplated irrigation must be filed at the time of making the entry,

"which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation."

It was also provided that no land should be patented under the act unless the entryman expended in permanent improvements on the land at least three dollars per acre for the tract reclaimed.

Under the Desert Act the sufficiency of the water supply was not submitted at the time of the making of the entry, but was held for final determination at the time

of making final proof. Under the Carey Act the matter is presented to the Secretary of the Interior for his approval prior to the construction of the works.

The Act of 1894 provided that 20 acres of each 160-acre tract of Carey Act land must be cultivated by the actual settler. But the Act of 1896 wiped out the provisions of the earlier act and provided that

> "when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract, then patents shall issue for the same to such state, without regard to settlement or cultivation."

It will thus be seen that all questions of settlement and cultivation of the land were wiped out by the Act of 1896 and that all it was necessary to do was to build the works and provide a water supply in order to obtain patent. A provision for settlement and cultivation by entrymen remained however in the State law (Sec. 1628 R. C.), and is a prerequisite to obtaining title by the settler from the State.

It is well known that the water supply of streams in the arid region fluctuates considerably from year to year, so that the question of the sufficiency of the water supply for the irrigation of a tract of land must always be a matter of estimate. Then again, in a community where water is scarce and land is plentiful, it becomes seriously important in what ratio water shall be used and in what ratio land shall be used.

> See Widtsoe's Principles of Irrigation Practice, pages 336-7.

This may be illustrated in this way: Thirty inches of water applied to one acre of land will give a yield of

21 tons of beets. The same amount of water applied to two acres of land gives a yield of 39 tons of beets. The same amount of water applied to three acres of land gives a yield of 56 tons of beets; the same again applied to four acres of land gives a yield of 65 tons of beets.

The same is true with all other crops.

See Widtsoe's Principles of Irrigation Practice, pages 248-50 and p. 274.

Where a settler has a certain water supply available it is frequently to his interest to use more land and less water per acre in order to get the greatest total yield from his water supply. This question of the economic use of water at the present time is most seriously important.

There is also another factor affecting irrigation projects and that is, that the same volume of water will suffice to irrigate two or three times as much land after it has been cultivated a few years as it will in the earlier stages of the project.

See report State Engineer of Wyoming, 1895-96, p. 42.

Taking the fluctuations of the water supply in the stream from year to year, the variableness of the seasons, and the fact that the same supply is two or three times as efficient on an old project as it is on a new one, it will at once be seen that the question of water supply is always a question of estimate. If the proof presented was not satisfactory the Secretary should not, of course, have approved the project. In this case no question of fraud arises.

When the plan is approved the question of the water supply is determined. The water supply is a thing that cannot be changed by human effort; the only thing to be done after the approval of the plan by the Secretary of the Interior is to build the works in accordance with that plan. The company has then performed its duty, provided it has done nothing adversely affecting the water supply originally provided for the project.

Under the original Desert Land Law where there was no settlement or cultivation it was necessary to determine by some means whether the water supply was sufficient. This depended upon the proof submitted; it was a matter of estimate. Under that act it is determined at the time of making final proof. A desert land entry is a mere notice of intention to reclaim land, and no question arises for decision by the Department until the final proof is submitted.

The plans presented under the Carey Act are something quite different. While they pass through the local land office for the purpose of enabling that office to enter a memorandum of the land to be irrigated upon its records, there is nothing for the local land officers to decide. There is, however, a very important question for the Department of the Interior to pass upon. The Department must determine whether the plans are feasible and the water supply sufficient. Having once given an approval of the plan and the works having been built, the Secretary cannot withdraw his approval. He is required in the first instance to approve or disapprove the project. If he has approved the project and the works have been built the patent must issue. The construction

of the statute and the right to the patent depend upon the determination of the time when the Secretary's decision is made. That is to say, whether it is made before the construction of the project or whether it is to be made afterwards.

From the standpoint of reason, of morals, and of law, the question of water supply must be decided by the Secretary of the Interior when the plan is presented to him. This is the purpose and object of such presentation. If the plan is not feasible it is the duty of the Secretary to reject it. If it is feasible it is his duty to approve it. When the Secretary gives his approval and sanction to the plan he gives it with the knowledge that the lands are being then and there segregated from the public domain; that upon his approval a lien will be fixed by the State under the statute upon the land, which lien must be paid by the settler; that enormous sums of money must be spent in constructing the irrigation works for the reclamation of the land upon the faith of the lien so established; and that hundreds of settlers must settle upon the land before the formal issuance of patent.

Those matters which after the presentation of the plans can be affected by human agencies, such as the construction of the works, are matters for subsequent determination; the others are not. The company building the works is a construction company only. It constructs the works as a contractor does in an irrigation district, and payment to it must be made from the liens fixed upon the land.

By his approval the Secretary says, if you build these works, the grant of land is earned.

The Carey Act took its color from the Irrigation Dis-

trict Law, and this was followed by the National Reclamation Act, which fixes a lien upon the land for the improvements made, the money being furnished by the Government without interest and the work being done through its agency. But on the National Reclamation projects as well as on Carey Act projects the water supply is a matter of estimate, and the interest which the scttler has is a proportionate interest in the supply.

See pgs. 53-4, original brief.

The Carey Act in many of its provisions is similar to the Desert Land Act, but there are the important differences: Under the Desert Land Act the claimant on making his entry merely makes a declaration of intention. This is followed by the final proof at which time the questions involved are decided. At the time of making entry no question arises for decision. All of the questions are to be determined at the time of making final proof. There is no right reserved in the Land Department to reject the entry at the time the filing is made on the grounds that the plans for the irrigation of the land are not feasible.

The Desert Land Act vests the local land officers with the power to pass upon the questions involved in the desert entry only at the time of making final proof, and this right is vested in the local officers subject only to the supervisory power of the Commissioner of the General Land Office and Secretary of the Interior.

Some of our public land statutes do not vest any authority to make decisions in the local land offices. Such, for instance, is the case in scrip entries.

Cosmos Exploration Co. v. Gray Eagle Oil Co.
190 U. S. 301.

In such cases the right to decide the questions involved is vested in the Commissioner of the General Land Office. Under the Carey Act the decision as to the feasibility of the plan presented and the sufficiency of the water supply is vested in the Secretary of the Interior, and the right, power and duty to decide upon the matter is imposed upon the Secretary upon the presentation of the plans. That is what they are presented for.

It may be claimed that by the formal contract made with the State (See form 37 L. D. 634) that the Secretary has reserved the right to further consider the question of the sufficiency of the water supply and the feasibility of the plan. Cases of this kind have sometimes arisen out of the issuance of patents where limitations have been sought to be inserted by the Land Department. In the case of Burke v. Southern Pac. R. R. Co., 234 U. S. 669, 58 L. Ed. 1527 (1552), the decision of Circuit Judge Sawyer in Cowell v. Lemmers, 21 Fed. 200, is quoted with approval, as follows:

> "There is no authority to issue a patent which in effect only says, if the lands herein described hereafter turn out to be agricultural lands then I grant them, but if they turn out to be mineral lands, then I do not grant them."

See also Davis v. Wiebold, 139 U. S. 507, 35 L. Ed. 238.

Referring to the issuance of patent without proper investigation as to the mineral character of the land, the Court in the Burke case quoted with approval from Bar-

den v. Northern Pa. R. R. Co., 154 U. S. 288, 38 L. Ed. 992, as follows:

> "It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if this has been done without fraud, though inadvisably, by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patent, the consequences must be borne by the Government until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them."

The Court also quoted with approval from Shaw v. Kellogg, 170 U. S. 312, 42 L. Ed. 1050.

In that case no patent had issued, but to avoid title passing by the issuance of patent to the mineral land in the grant, the Commissioner prevailed upon the Surveyor General to conditionally approve the field notes and survey of the Mexican grant under consideration. The Court said:

> "What is the significance of and what effect can be given to the clause inserted in the certificate of approval of the plat, that it was subject to the conditions and provisions of the Act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide; to execute, and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It is an agent and not a principal. * * * Undoubtedly it could refuse to approve the location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location, provided no mineral land should ever thereafter be discovered; in other

words, that the locator must take the chance of future discovery of mineral. It was a question for its action, and its action at the time. * * * It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land, or else denying it altogether."

The Court, referring to the questions before it in the Burke case, said:

"Lastly, it is urged that the railroad company accept the patent with the mineral exception therein, and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals, but agents of the law, and must heed only its will."

The Supreme Court of Oregon, in State v. Deschutes Land Co. 129 Pac. 764, had before it provisions of the contract between the State of Oregon and a Carey Act company, wherein the company had agreed with the State that no settlers' contracts would be entered into until after the works had been constructed and notice that water was available had been given by the State. In that case the company disregarded the provision and entered into contracts in violation of such provisions of the State contract, and the State sought to enjoin the company from entering into settlers' contracts in advance of the time fixed by the State contract. The Court said:

"The question is whether the State Land Board had authority to insert the provision quoted in the contract with the defendant. By its legislation the State created the State Land Board as its agent to transact the business provided for in the act. There is no apparent authority, so called, in a public officer whose duties are prescribed by statute like there would be in the case of an agent for a private party. The representative of the State must have actual authority in such cases. The agent of the State, acting under a public law, must find sanction for his doings in the statute itself, and parties dealing with such agent are bound, at their peril, to take notice of the enactment conferring the agent's authority. A contract made by a public officer in excess of the provisions of the statute authorizing such contract is void, so far as it departs from or exceeds the terms of the law under which it was attempted to be negotiated. * * * Being a departure from the Board's authority, and this contrary to the statute, the provision is void and does not bind either party to the instrument, because the contract, to be efficacious, must be equally binding upon both parties. The defendant had a right to contract to do in the future what might legally be done under the provisions of that section (referring to the statute). While it would be within the scope of legislative authority to prevent actual settlers from going upon the land and stipulating with the corporations for the extinguishment of its lien, so that the settler could proceed unhampered in the establishment of his home, yet this species of paternalism was not vested in the State Land Board."

From a consideration of the whole situation, therefore, we say that the matter of the feasibility of the project and the sufficiency of the water supply was passed upon and approved by the State, and then presented to the Secretary of the Interior for his action; that he then had the power to decide the question of the sufficiency of the water supply and the feasibility of the project. That in do-

ing this in advance of the cultivation of the land he was only doing that which was customarily done under the Desert Act before the cultivation of the land. That from the standpoint not only of law, but of morals, it was his duty particularly to decide upon the question of the sufficiency of the water supply, because such supply was not a thing that could be changed by any human effort. After the decision of the Secretary of the Interior nothing remained that could be effected by human agencies, except the doing of the construction work; and as to this, we say that the Secretary must decide in advance as to what work is to be done. A large investment must be made after the approval by the Secretary and before the issuance of patent. The lands are segregated by the Secretary for the purpose of having a lien placed upon them, in order that the builders of the works may be compensated for their cost.

The question of the cost per acre is determined by the total cost and by the number of acres to be irrigated. The works may, and probably in every instance do, cost more than originally contemplated. But this makes no difference. The lien in favor of the construction company having been placed upon the land in the beginning cannot thereafter be changed.

Between the time of approval by the Secretary and the issuance of patent hundreds of people enter upon these lands, making homes and cultivating the lands in part, the State statute requiring that the lands be settled upon and one-eighth thereof be put in cultivation (Sec. 1628, R. C.) before the settler gets his final certificate from the State, which is issued to him before the patent is received by the State. The settler made his entry upon the faith of

the approval of the project by the State and by the Secretary of the Interior. He ought not to be expected, after the company has built the works and the settler has performed his agreement on his part, to then face the contingency of taking title either to none of his land or only to a part of it. The investor, after having put hundreds of thousands of dollars into the project, ought not to face the possibility that, after he has done everything possible that could be called for by human effort, that the Secretary of the Interior may change his mind and conclude that the water supply is insufficient and the project not feasible. The lien is authorized to be fixed after the approval of the project and before the construction of the works.

We therefore say that these questions must be decided by the Secretary of the Interior when the project is presented to him for his approval, and that such decision is final.

It is set forth in the bill that in order for settlers on the tract to comply with the provisions of the Carey Act and irrigate and reclaim their lands, it will be necessary for them to have 2.75 acre feet of water per acre delivered by rotation, or .01 (1-2 miner's inch) of a second foot, continuous flow, per acre throughout the entire irrigation season, amounting to 4.16 acre feet. This is put in issue by the answer. So that the question of whether or not the State will be able to obtain a patent for the land, which will inure to the benefit of the settlers, is a question for consideration in this case.

To summarize this question as to the issuance of the patent, we say:

1. The plan of the law provided for State supervision, and a determination prior to the acceptance of the project and the building of the works, of the sufficiency and feasibility of the works and the sufficiency of the water supply. It provided for the approval of the Secretary of the Interior prior to the making by the State of any contract for the construction of the works. After such approval it provided for the fixing of a lien upon the land for the cost of the works, by the State, such lien being fixed by the contract with the State. This lien was fixed for a certain amount per acre upon a certain area of land.

2. The State statute, followed the plan of the Act of Congress, and the Company building the works stands in the position of a construction company only. The amount of the lien, once determined, cannot be changed. It is settled by being fixed in advance of the construction. The plans presented to the Secretary of the Interior are presented to him for final action. His approval determines the question. The statute providing that "When an ample supply of water is actually furnished in a substantial ditch or canal * * * for reclaiming a particular tract * * * then patent shall issue for the same to such State" refers to the method of reclamation provided in the plan approved by the Secretary of the Interior; and since the amount of the water supply cannot be changed by human effort, the water supply referred to is the water supply which he has already approved. Where the works are constructed in accordance with the plan presented, patent for the land must issue, the water supply having been predetermined.

The lien is fixed by the State contract, and is earned by the building of the works, which is the only thing remaining to be done by human agency after the approval of the plan. The question of whether the land has been reclaimed or not is purely a question of whether the works have been built in accordance with the plans and with the contract with the State. The decision of the Secretary in approving the water supply when the plans are presented is final and conclusive. The officers of the State in examining and approving the plans act as agents or trustees for the settlers who are thereafter to occupy the project, and that the Secretary of the Interior is likewise in the same position.

Since the sufficiency of the water supply was approved by both State and National authorities, it is no longer open to question. This point being so determined is decisive of the case, and the complainants cannot recover because they voluntarily entered this land after the approval of the project and after the making of a contract for the construction of the works between the State and the construction company.

The determination of the State and National officers was final as to the amount of the lien, the nature and character of the works to be built, and the sufficiency of the water supply, and therefore there is nothing further to be considered. In the original brief this matter was but lightly touched upon and the case was chiefly considered from other standpoints.

The other principal question to be decided in the case is:

Did the company make a contract to deliver 2.75 acre feet of water per acre, under the rotation system, or .01 of a second foot of water per acre, continuous flow, from April 1st to November 1st of each year?

The Court held that the Company had made a contract to deliver a certain amount of water. It is our position that no such contract was made, but on the other hand, the settler is entitled by statute to a proportionate amount of the entire supply taken out for the project. We say that the lower court ignored the statute.

Water rights are taken out in Idaho by making an application to the State Engineer (Sec. 3253 R. C.). The application sets forth the source of the water supply; the location and description of the irrigation works; the amount of water to be diverted, and other similar matters. The application must be accompanied by a plan of the proposed works showing the character and dimensions of the works and the area and location of the lands proposed to be irrigated. The approval of this application gives to the person filing it what is known as a permit for the appropriation of water. It will be seen from the statute that the total area of land to be irrigated is given in the application and the total water supply which may be diverted to be used for that purpose is specified.

It is such an application or permit as this that is required to be filed under the statute at the time of filing the proposal for the construction of works under the Carey Act (Secs. 1615-1618, R. C.). This application is simply a request for permission to divert a certain

number of second feet of water from the source of supply. By the approval of the application by the State Engineer the consent of the State is given. The important thing that then devolves upon the State Engineer in Carey Act projects is to report (Sec. 1618, R. C.) whether there is sufficient

> "unappropriated water in the source of supply and whether or not a permit to divert and appropriate water through the proposed works has been approved by him."

Neither the application nor the water permit make any statement as to whether the amount of water sought to be appropriated is continuously to be found in the source of supply. The application simply calls for leave to divert a certain number of second feet from the stream. That is a matter which is left to the determination of the State Engineer (Sec. 1618, R. C.). This matter having been determined by the representative of the State, the statute steps in and provides that the water right, so called, sold to settlers, shall "embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto;" the "rights and franchises" here mentioned are the water rights.

> State Ex. Rel. West v. Twin Falls Canal Co., 21 Idaho 410 (424).

The question here to be determined is, did the settler obtain the water right which is prescribed by statute? Or did the company contract to give him something else? It will not be presumed that the statute was disregarded, and, such being the case, it must prevail, and the interest

of the settler is therefore, a proportionate interest in the entire supply.

Estimates, of course, are made by engineers in advance of the construction of the project as to what the water supply is. In this contract (page 49, Trans.) it was stated:

> "It is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream during the irrigation period, has been determined to be sufficient to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated."

This was undoubtedly the estimate made by the engineer based upon the data he had in hand. And this provision appears upon its face to be an estimate of this character. This is the only place in this contract where a water supply of 2.75 acre feet of water per acre is mentioned.

In drawing the contract it was necessary to determine the size or capacity of the canals to be built. The capacity of the canal governs the "head" that can be delivered, and therefore is a very important matter. The contract (page 48, Trans.) provided:

> "And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of .01 of a second foot per acre for each acre of land to be irrigated."

Again the contract provided (page 50, Trans.):

> "Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of .01 of one cubic foot of water per acre per second of time. And each share

> or water right sold, or contracted to be sold, as herein provided, shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein."

In another place the contract provided (page 54, Trans.) that the certificate of share of stock in the operating company should represent "a water right of .01 of a cubic foot per second for each acre of land irrigated," as provided in paragraphs IV. and VIII. of this contract, being the paragraphs hereinbefore quoted.

The manner of the use of the water, however, was limited in the same paragraph in which the above quotation occurs or it was provided:

> "While the party of the second part shall retain control of the said Salmon River Canal Company, Limited, water shall be measured to users from the place of diversion at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine, but according to such rules and regulations based upon a distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system."

Taking these provisions of the contract it will be seen that it was the estimate of the engineer that there would be 2.75 acre feet of water for each acre of land to be irrigated, running into the reservoir, that is, measured at the point of inflow. Furthermore, that the canal system was to be built large enough so as to deliver a "head" of .01 of a second foot of water. Next, that this "head" of water was to be delivered in a rotation system as frequently as the needs of the crops required.

In the draft of the Carey Act contract originally prepared in 1899 (see page 46, original brief), there was a provision for the delivery of a specified number of acre feet of water. Even this, under the statute, would have been merely the engineer's estimate as to what the proportionate interest of the settlers was. But this provision in Carey Act contracts was eliminated long before the making of the present contract (page 48, original brief).

The National Reclamation Act followed the same idea. Water was taken out in bulk for the entire project, and the amount which the settler obtains is a proportionate interest in the gross supply (see page 53, original brief).

The company does not own the land to be reclaimed. It has only a lien on it. Neither does it "own" the water. The State owns the water and the lands are to be patented to the State. The company is a mere agency to get the land and water together by means of the building of the works.

There is another question which affects this matter of the making of the contract for a specific amount of water. Not desiring to rest their case entirely upon the provisions of the contract, the complainants allege that the amount of water which they claim is *necessary* in order to reclaim the land so that it may produce agricultural crops. It was provided in the Act of 1894 that the land should be reclaimed as thoroughly as may be required of persons who may enter under the desert land law. Under the Act of 1896 the necessity for settlement and cultivation is done away with. But the plan which is to be presented to

the Secretary of the Interior under the Act is a plan which shall

> "be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops."

We take this as a definition of the amount of water thus necessary to reclaim the land and we admit that this question must be determined at some time. We say that the statute prescribed that the total amount of water necessary for he entire tract in bulk is specified in the water permit, and that the statute makes the interest of each settler a proportionate amount in the entire supply, and that when it was determined that the water supply was sufficient, both by the State and National authorities, that this was a final determination of that question in accordance with the terms of the act. And we furthermore say that the water supply is governed by the statute rather than by contract, and the decision of the lower court upon this point was clearly error.

Place of Measurement.

The report of the State Engineer was to the effect that "400,000 acre feet of water can be impounded annually." This simply meant that that amount of water ran into the reservoir from the source of supply. In other words, this was the point at which the general supply of water was measured.

Now since each of the settlers has a proportionate interest in the water supply, and as some of them are much nearer the source of supply than others, it is necessary to fix a point at which the common supply of water shall

be measured out among the users. And in order to make this division equitable, it is provided in the State contract (page 52, Trans.), that "water shall be measured to users at the place of diversion from the main laterals of such irrigation system." A main lateral is defined in the contract as a lateral extending from the main line of the canal (page 27 Trans.).

The estimate made in the State contract of the capacity of the reservoir (page 48, Trans.) was an estimate of the total capacity of the reservoir; that is to say, that a reservoir having a capacity of ~~18,000~~ 180,000 acre feet from which the water was constantly flowing during the irrigation season, would, with the inflow into the reservoir, furnish 2.75 acre feet per acre. That this is true is shown by the estimates made by the State Engineer. 400,000 acre feet for the total amount of the runoff for 150,000 acres of land would be somewhat less 2.75 acre feet per acre.

This and other points are discussed more fully in the original brief.

The company has no means of obtaining the money invested in this project except through payments made by settlers on the tract. In order to obtain the money it is necessary to make the project commercially successful. The company is asking its legal rights in order that it may be in a position to accomplish this end. As matters stand now its hands are tied.

In conclusion, we say that the question as to the sufficiency of the water supply was determined in advance by the State and by the National authorities. That it was the duty of the Secretary of the Interior to determine this question in advance. That he could not shirk

this responsibility, and that he could not recall his approval after the works have been completed. That the determination as to the water supply being final that no further question can arise thereon in this suit.

Furthermore we say that there was no contract made for the delivery of any specific amount of water; that a water right for the entire tract was taken out in bulk, and that the right of each settler is a proportionate interest therein. That the lien upon the land was fixed in advance, and was intended to be fixed prior the issuance of patent and to be valid from the time it was fixed. That the question of the sufficiency of the water supply must be determined when the plans are presented to the Secretary, instead of when the papers are presented for patent.

That the estimate of the water supply was based upon the amount of water flowing into the reservoir. That the estimate of 2.75 acre feet per acre for each acre was based upon this measurement at that point, and that there is nothing in the entire transaction, or in the contract, to justify the place of measurement fixed by the court. The main question discussed in the original brief was as to whether or not testimony might be introduced to show the inadequacy of the water supply or the area which the apparent present supply would irrigate. And as to this point, we rest upon the argument presented in the original brief.

Respectfully submitted,

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